Supreme Court, U.S.
FILED

091212 APR 6 - 2010

OFFICE OF THE CLERK

No. 09-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

BILLY GROVES, individually, d.b.a. Savannah Re-Load,
SAVANNAH RE-LOAD, and
BRAMPTON ENTERPRISES, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. KEENAN
KEENAN COHEN & HOWARD P.C.
One Pitcairn Place
165 Township Line Road
Suite 2400
Jenkintown, PA 19046-3535
(215) 609-1110
pkeenan@freightlaw.net

Attorney for Petitioner

229158

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This is a case about the delivery, use and possession of rail cars within the United States. The decision of the U.S. Court of Appeals for the Eleventh Circuit in this case is one of a growing number of conflicting court decisions which are having the practical effect of imposing rules for the delivery and possession of rail cars which differ sharply depending upon the location of delivery on the national rail system. And while this significant conflict continues to escalate, little attention has been given to the exclusive jurisdiction over this subject matter given by Congress to the U.S. Surface Transportation Board.

The source of the confusion turns on the disagreement between the Circuit Courts as to the proper definition of the word "consignee," a fundamental term which appears in every railroad's tariff regulating rail car use. To resolve this division of authority, the following questions are presented to this Court:

1. Whether "consignee" can be properly defined in railroad tariffs as the party named as consignee on a bill of lading that physically accepts delivery of all freight consigned to it, or whether the definition of "consignee" in such tariffs must also require proof that the party so named on the bill of lading explicitly consented to being named as consignee before accepting delivery, as required by the U.S. Court of Appeals for the Eleventh Circuit.

2. Whether this Court should resolve the conflicting definitions of "consignee" in the interest of uniformity in interstate commerce and follow the holding of the U.S. Court of Appeals for the Third Circuit, which comports with the traditional, commercial, regulatory and statutory definitions of "consignee."

3. Whether the courts have subject matter jurisdiction to interpret the terms or expand the requirements of a railroad's rail car demurrage tariff.

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The caption of this petition contains the names of all the parties to the proceeding in the court below whose judgment is sought to be reviewed.

Petitioner, Norfolk Southern Railway Company ("NSRC"), the plaintiff-appellant below, is a non-governmental corporation which is a wholly owned subsidiary of Norfolk Southern Corporation ("NSC"). NSC is a non-governmental, publicly held corporation that holds 10% or more of NSRC's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
RELEVANT PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	10
Statutory Background	12
Rail Car Shortages Are Cyclical and Frequently Result in National Emergencies	16
Rail Cars at Issue	18
Proceedings Below	18
Jurisdiction of the Courts Below	19

Contents

	Page
REASONS FOR GRANTING THE PETITION ..	20
A. This Court Should Grant the Petition in Order to Resolve the Direct Conflict Between the Decisions of the Third and Eleventh Circuits Which Threatens to Transform a National Rail System into a Rail System of Different Circuits	22
B. This Court Should Grant the Petition Because the Eleventh Circuit Did Not Have Jurisdiction to Render a Decision That Interprets the Provisions of a Rail Carrier's Demurrage Tariff	26
C. The Eleventh Circuit's Decision Imposes an Unclear and Unworkable Rule Upon the Interstate Rail Network and Constitutes a Departure from the Accepted and Usual Course of Judicial Proceedings Which Calls for an Exercise of This Court's Power	30
CONCLUSION	35

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed November 2, 2009 ..... 1a

Appendix B — Opinion Of The United States District Court For The Southern District Of Georgia, Savannah Division Dated And Filed September 15, 2008 ..... 22a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Filed January 7, 2010 ..... 35a

TABLE OF CITED AUTHORITIES

Page

CASES

Ametek, Inc. – Petition for Declaratory Order; Ametek, Inc. v. Panther Valley Railroad Corp., et al., 1993 ICC LEXIS 13, ICC Docket No. 40664 (ICC served January 29, 1993) .. 14, 33

Capitol Materials, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company, 2004 STB LEXIS 227, STB Docket No. 42068 (STB served April 12, 2004) .. 13, 16, 28

Car Demurrage Rules, Nationwide, 350 I.C.C. 777, 1975 I.C.C. LEXIS 52 (1975) 13, 17, 24

Chrysler Corp. v. New York C.R. Co., 234 I.C.C. 755 (1939) 13

CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573 (N.D. Ga. 1996) 29

CSX Transp. Co. v. Novolog Bucks County, 502 F.3d 247 (3d Cir. 2007), *cert denied*, 128 S. Ct. 1240 (2008) ..... *passim*

Illinois Central R.R. v. South Tec Development Warehouse, No. 97 C 5720, 1999 U.S. Dist. LEXIS 11222 (N.D. Ill. July 16, 1999) 28

Cited Authorities

Page

Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc., 337 F.3d 813 (7th Cir. 2003) 11, 23, 24, 28

Norfolk Southern Ry. v. Consolidated Freightways Corp., 443 F.3d 1160 (9th Cir. 2006) 14

Norfolk Southern Ry. Co. v. Groves, 586 F.3d 1273 (11th Cir. 2009) ..... *passim*

Norfolk Southern Ry. v. Groves, Case No. CV-407-155, 2008 U.S. Dist. LEXIS 83286 (S.D. Ga. Sept. 15, 2008) ..... *passim*

Northwest Airlines v. County of Kent, 510 U.S. 355, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994) 29

Pa.R.R.Co. v. Kittanning Iron & Steel Mfg. Co., 253 U.S. 319, 40 S.Ct. 532, 64 L.Ed. 928 (1920) 16, 21, 24

PCI Transp., Inc. v. Fort Worth & Western R.R. Co., 418 F.3d 535 (5th Cir. 2005) 28

PCI Transportation, Inc. v. Fort Worth & Western R.R. Co., 2008 STB LEXIS 218, STB Docket No. 42094 (Sub-No. 1) (STB served April 25, 2008) 28

Cited Authorities

Page

Pittsburgh, C.C., & St. Louis Ry. Co. v. Fink, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919) 20

R. Franklin Unger, Trustee of the Indiana Hi-Rail Corp., Debtor – Petition for Declaratory Order -- Assessment and Collection of Demurrage and Switching Charges, 2000 STB LEXIS 333, STB Docket No. 42030, *6 (STB served June 14, 2000) 13, 28

South Tec Development Warehouse, Inc. and R.R. Donnelley & Sons Co. – Petition for Declaratory Order – Illinois Central Railroad Company, 2000 STB LEXIS 666, STB Docket No. 42050 (STB served November 13, 2000) 13, 28

U.S. v. Western Pac. R.R., 352 U.S. 59, 77 S. Ct. 161, 1 L. Ed. 2d 126(1956) 28

Cited Authorities

Page

STATUTES & REGULATIONS

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 19

28 U.S.C. § 1337 19-20

Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.* 2, 10, 11, 12, 20

49 U.S.C. § 10501(b) 3, 11, 12, 28, 29

49 U.S.C. § 10702 ..... 4, 28

49 U.S.C. § 10704 4

49 U.S.C. § 10741 ..... 5, 25, 26

49 U.S.C. § 10743(a)(1) 6, 22, 30

49 U.S.C. § 10746 ..... *passim*

49 U.S.C. § 80101(1) 7, 14

49 U.S.C. § 80103 31

49 U.S.C. § 80110 ..... 8, 32

49 C.F.R. § 1201.1-1(a) 14

Cited Authorities

Page

MISCELLANEOUS

Black's Law Dictionary, p. 307 (6th ed. 1990) .. 27, 34

Black's Law Dictionary, p. 327 (8th ed. 2004) 14, 27, 34

BNSF Railway Company BNSF Demurrage Book 6004-A, Item 1005K(F) available at http://newdomino.bnsf.com/website/prices.nsf/55abb888cb03db6286256d7100515608/a107fd3ba598a27586257643004d1070/$FILE/Revision%2056.pdf, last visited April 1, 2010 16

Class I Railroad Statistics, Association of American Railroads – Policy and Economics Department, September 10, 2009, available at http://www.aar.org/Resources/Publications/Publications%20Landing%20Page.aspx, last visited March 22, 2010 ("Class I Railroad Statistics") 14

CSX Transportation Tariff CSXT 8100, Item 8070(G) available at http://www.csx.com/share/customers/tariff/docs/CSXT_8100_Demurrage_Provisions_Section_VIII_as_of_122002-REF10286.pdf, last visited April 1, 2010 16

Cited Authorities

Page

Grand Trunk Corporation Tariff CN 6580-H, Item 800(F) available at http://ecprod.cn.ca/ebusiness/eDistribution/english/public/DisplayPage?URL=PriceDocuments?s_icid=PriceDocs-feature-rght-pricedocs, last visited April 1, 2010 15

Kansas City Southern Railway Company Demurrage and Storage Tariff KCS 6000-E, Item 110(G) available at http://www.kcsouthern.com/en-us/Customers/Documents/2009/09-11-09KCS6000ERevision7.pdf, last visited April 1, 2010 15

Merriam-Webster Online Dictionary, 2009, retrieved November 17, 2009, from http://www.merriam-webster.com/dictionary/consignee 14

Norfolk Southern's Tariff NS 6004-B, Item 200(6) 33

Norfolk Southern's Tariff NS 6004-B, Item 850(5) 28

Cited Authorities

Page

Soo Line Railroad Company Railcar Supplemental Services Tariff 2, Item 16 available at http://www8.cpr.ca/cms/NR/rdonlyresedhmk5s6z6zefgf3e6bk7ua6tns2apt7xgccs mje4q3cgpgoztv5hsuzxkp4fcucs2vv 3kdltjk6utbld3ymfezxqub/Tariff+2+ +Railcar+Supplemental+Services+ +R2010.0.pdf, last visited April 1, 2010 15

TTX homepage, available at http://www.ttx.com/-TTXHome.aspx, last visited March 22, 2010 10

U.S. Freight Railroad Statistics, Association of American Railroads – Policy and Economics Department, June 10, 2009, available at http://www.aar.org/Resources/Publications/Publications%20Landing%20Page.aspx, last visited March 22, 2010 10

Webster's Third New International Dictionary (1971) 14, 27

OPINIONS AND ORDERS BELOW

The decision of the U. S. Court of Appeals for the Eleventh Circuit is reported at *Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273 (11th Cir. 2009), and is reproduced in the Appendix ("App.") at 1a-21a. The Eleventh Circuit's order denying Norfolk Southern's timely petition for panel rehearing and/or rehearing *en banc* was issued January 7, 2010, and is reproduced at App. 35a-36a.

The decision of the U. S. District Court for the Southern District of Georgia is unpublished, but reported at *Norfolk Southern Ry. v. Groves*, Case No. CV 407-155, 2008 U.S. Dist. LEXIS 83286 (S.D. Ga. Sept. 15, 2008) and is reproduced at App. 22a-34a.

JURISDICTION

The Eleventh Circuit affirmed the decision of the district court granting summary judgment on November 2, 2009. A timely petition for panel rehearing and/or rehearing *en banc* was denied on January 7, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the Eleventh Circuit on a writ of certiorari.

RELEVANT PROVISIONS INVOLVED

49 U.S.C. § 10101

In regulating the railroad industry, it is the policy of the United States Government—

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> . . .
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> . . .
>
> . . .

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9 to encourage honest and efficient management of railroads;

. . .

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

49 U.S.C. § 10501(b)

(b) The jurisdiction of the Board over—

(1) Ttransportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) . . .

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10702

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable—

(1) Trates, to the extent required by section 10707, divisions of joint rates, and classifications for transportation and service it may provide under this part; and

(2) rules and practices on matters related to that transportation or service.

49 U.S.C. § 10704

(a)

(1) When the Board, after a full hearing, decides that a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board under this part, or that a classification, rule, or practice of that carrier, does or will violate this part, the Board may prescribe the maximum rate, classification, rule, or practice to be followed. The Board may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Board.

. . .

(d) Within 9 months after January 1, 1996, the Board shall establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates. The procedures shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings and exemption or revocation proceedings, including appropriate sanctions for such delay, and for ensuring prompt disposition of motions and interlocutory administrative appeals.

49 U.S.C. § 10741

(a)

(1) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may not subject a person, place, port, or type of traffic to unreasonable discrimination.

(2) For purposes of this section, a rail carrier engages in unreasonable discrimination when it charges or receives from a person a different compensation for a service rendered, or to be rendered, in transportation the rail carrier may perform under this part than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances.

(b) This section shall not apply to—

(1) contracts described in section 10709 of this title;

(2) rail rates applicable to different routes; or

(3) discrimination against the traffic of another carrier providing transportation by any mode.

(c) Differences between rates, classifications, rules, and practices of rail carriers do not constitute a violation of this section if such differences result from different services provided by rail carriers.

49 U.S.C. § 10743(a)(1)

Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—

(A) of the agency and absence of beneficial title; and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10746

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—

(1) freight car use and distribution; and

(2) maintenance of an adequate supply of freight cars to be available for transportation of property.

49 U.S.C. § 80101(1)

In this chapter—

(1) "consignee" means the person named in a bill of lading as the person to whom the goods are to be delivered.

49 U.S.C. § 80110

(a) General Rules.—Except to the extent a common carrier establishes an excuse provided by law, the carrier must deliver goods covered by a bill of lading on demand of the consignee named in a nonnegotiable bill or the holder of a negotiable bill for the goods when the consignee or holder—

(1) offers in good faith to satisfy the lien of the carrier on the goods;

(2) has possession of the bill and, if a negotiable bill, offers to indorse and give the bill to the carrier; and

(3) agrees to sign, on delivery of the goods, a receipt for delivery if requested by the carrier.

(b) Persons to Whom Goods May Be Delivered.— Subject to section 80111 of this title, a common carrier may deliver the goods covered by a bill of lading to—

(1) a person entitled to their possession;

(2) the consignee named in a nonnegotiable bill; or

(3) a person in possession of a negotiable bill if—

(A) the goods are deliverable to the order of that person; or

(B) the bill has been indorsed to that person or in blank by the consignee or another indorsee.

. . .

Norfolk Southern's Tariff NS 6004-B[1]

ITEM 200 – GLOSSARY OF TERMS

FOR THE PURPOSE OF APPLYING PROVISIONS IN THIS PUBLICATION, THE FOLLOWING ARE DEFINED AND SHALL GOVERN:

. . .

6. **Consignee:** —The party to whom a shipment is consigned or the party entitled to receive the shipment.

* * *

ITEM 850 – DEMURRAGE PLAN

. . .

5. Demurrage charges will be assessed against the consignor at origin or the consignee at destination who will be responsible for payment.

---

[1] These relevant provisions of the tariff were made a part of the record in the district court proceedings. Docket No. 46-6. All references to "Docket No." refer to docket entries on the district court's docket in *Norfolk Southern Ry. v. Groves*, Case No. CV-407-155 (S.D. Ga.).

STATEMENT OF THE CASE

In 2007, 563 freight railroads transported 2.26 billion tons of freight across the United States rail network.[2]

Remarkably this enormous amount of freight was transported using only 1.3 million rail cars, the majority of which are owned by either the freight railroads or the rail car leasing company which several rail carriers own jointly. [3] Rail cars are an essential but costly asset [4] of each railroad with limited durability.

To assure adequate rail car capacity sufficient to support the requirements of commerce, Congress has by statute required the nation's railroads to maintain and enforce tariffs which impose prescribed rail car demurrage charges against consignees who continue to possess their rail cars beyond the specified "free time" following delivery. 49 U.S.C. § 10746. Congress has also directed that the U.S. Surface Transportation Board (the "STB")[5] shall have exclusive jurisdiction to regulate

---

[2] U.S. Freight Railroad Statistics, Association of American Railroads – Policy and Economics Department, June 10, 2009, p. 1, available at http://www.aar.org/Resources/Publications/Publications%20Landing%20Page.aspx, last visited March 22, 2010 ("Freight Railroad Statistics").

[3] *See id.*; *see also* http://www.ttx.com/TTXHome.aspx, last visited March 22, 2010 (The fleet of rail car leasing company TTX consists of more than 210,000 rail cars).

[4] See fn. 13-14, *infra*.

[5] The Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.*, overhauled the (Cont'd)

the content, interpretation, and application of the railroads' demurrage tariffs. 49 U.S.C. § 10501(b). The assurances of an adequate rail car supply to fulfill national needs has been deemed by Congress to be in the nation's best interest as a matter of commerce and security. 49 U.S.C. § 10746.

As the railroads have turned to the courts to enforce their ability to collect from consignees rail car demurrage which accrued under their tariffs, different U.S. Courts of Appeals have acknowledged their clearly conflicting rulings with respect to the application of such tariffs, and the definition of "consignee." *See CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007), *cert denied*, 128 S. Ct. 1240 (2008); *cf. Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273, 1280-81 (11th Cir. 2009) (acknowledging a conflict of authority among the Third, Seventh and Eleventh Circuits); *and cf. Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003). The ruling by the U.S. Court of Appeals for the Eleventh Circuit in this case has left the nation's interline railroads with different rules and liabilities depending upon in which U.S. Circuit the delivering track is located.

In taking it upon itself to redefine the term "consignee," and expand the duties owed to a consignee,

---

(Cont'd)

Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* ("I.C.A." or "the Act"). Among other things, the revision eliminated the Interstate Commerce Commission ("ICC") and replaced it with the STB. *PCI*, *infra*, 418F.3d at 538. For the sake of consistency, 49 U.S.C. § 10101 *et seq.* will be referred to as the I.C.A. throughout in this petition.

the U.S. Court of Appeals for the Eleventh Circuit implicitly rejected the terms of the rail carrier's controlling tariff, and simply trampled over the exclusive jurisdiction, expertise, and prior rulings of the STB. The end result is a national interline rail system rendered disjointed by conflicting Circuit rulings applicable to the handling, possession and delivery of rail cars, and a specially created administrative agency, *i.e.*, the STB, which as a practical matter has been stripped of its capacity to regulate the application of rail tariffs.

This Court should grant certiorari to resolve whether the courts have subject matter jurisdiction to interpret and expand the requirements of railroad tariffs, as well as to restore uniformity in interstate commence by enforcing the statutory and traditional definition of "consignee" applied by the U.S. Court of Appeals for the Third Circuit.

Statutory Background

In accordance with Congressional mandate, the nation's rail network is operated subject to federal regulation by the STB.[6] The STB's mission under the Act is "to ensure the development and continuation of a sound rail transportation system to meet the needs of the public and the national defense." 49 U.S.C. § 10101(4). Congress also mandated all railroads to establish demurrage rules and charges so as to fulfill national needs for an adequate supply of freight cars, subject to the exclusive jurisdiction of the STB. 49 U.S.C. § 10501(b); 49 U.S.C. § 10746.

---

[6] See fn. 5, *supra*.

Demurrage is a charge that both compensates rail carriers for the expenses incurred when rail cars are unreasonably detained at origin or destination, and serves as a penalty to encourage the speedy return of rail cars to the network.[7] In compliance with the statutory directive, each rail carrier has published a rail car demurrage tariff subject to the jurisdiction and approval of the STB. A party's obligation to pay demurrage arises out of the terms of a rail carrier's lawful establishment of such charges in a published tariff. *Unger*, 2000 STB LEXIS 333, *8.[8]

Petitioner Norfolk Southern Railway Company ("NSRC") established its own demurrage rules and charges in Tariff NS 6004-B ("the tariff") so as to comply with 49 U.S.C. § 10746. *Groves*, 586 F.3d at 1275–76. This public tariff provides that "[d]emurrage charges will be assessed against the consignor at origin or the **consignee** at destination who will be responsible for payment." *Id.* at 1276 (quotation in original) (*citing*

---

[7] *R. Franklin Unger, Trustee of the Indiana Hi-Rail Corp., Debtor – Petition for Declaratory Order – Assessment and Collection of Demurrage and Switching Charges*, 2000 STB LEXIS 333, STB Docket No. 42030, *6 (STB served June 14, 2000) (*citing Chrysler Corp. v. New York C.R. Co.*, 234 I.C.C. 755, 759 (1939); *Capitol Materials, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company*, 2004 STB LEXIS 227, STB Docket No. 42068, *3 (STB served April 12, 2004) (citation omitted); *South Tec Development Warehouse, Inc. and R.R. Donnelley & Sons Co. – Petition for Declaratory Order – Illinois Central Railroad Company*, 2000 STB LEXIS 666, STB Docket No. 42050, *6 (STB served November 13, 2000) (citation omitted).

[8] The first railroad National Demurrage Tariff was filed with the ICC in 1919. *Car Demurrage Rules*, 350 I.C.C. 777, *infra*.

Tariff, Item 850(5)) (emphasis supplied). The tariff defines consignee as "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment." Tariff, Item 200(6). The Federal Bills of Lading Act, Black's Law Dictionary and the tariff define consignee in a consistent manner.[9] *Groves*, 586 F.3d at 1276 n. 3 (*citing* 49 U.S.C. § 80101(1) (1994) (*and citing Black's Law Dictionary*, p. 327 (8th ed. 2004).[10] The provision in the tariff assessing demurrage against the consignee at destination is consistent with the published demurrage tariffs of the other Class I railroads.[11]

---

[9] The definition of consignee in the tariff is also consistent with the Uniform Commercial Code, ICC decisions and common usage. *Novolog*, 502 F.3d at 258 n. 11 (*citing* U.C.C. § 7-102(a)(3)); *Novolog*, 502 F.3d at 257 (*citing Webster's Third New International Dictionary* (1971)); *see also Merriam-Webster Online Dictionary*, 2009, retrieved November 17, 2009, from http://www.merriam-webster.com/dictionary/consignee; *Ametek, Inc. – Petition for Declaratory Order; Ametek, Inc. v. Panther Valley Railroad Corp., et al.*, 1993 ICC LEXIS 13, ICC Docket No. 40664, *16-17, 20-21 (ICC served January 29, 1993) ("*ICC Ametek*"); *and see Novolog*, 502 F.3d at 261 (recognizing the ICC's holding in *ICC Ametek*").

[10] *See also Black's Law Dictionary*, p. 307 (6th ed. 1990).

[11] Class I Railroads are the largest railroads, classified by revenue, as defined by the STB. *Norfolk Southern Ry. v. Consolidated Freightways Corp.*, 443 F.3d 1160, 1161 n. 1 (9th Cir. 2006) (*citing* 49 C.F.R. § 1201.1-1(a)). There are currently seven Class I railroads. *See* Class I Railroad Statistics, Association of American Railroads – Policy and Economics Department, September 10, 2009, p. 2, available at *http://www.aar.org/Resources/Publications/Publications%20Landing%20Page.aspx*, last visited March 22, 2010 ("Class I Railroad Statistics").

(Cont'd)

(Cont'd)

The demurrage tariffs of the Class I railroads are consistent with NSRC's tariff. Compare the following:

- Grand Trunk Corporation Tariff CN 6580-H, Item 800(F) ("Extended asset use charges will be assessed against the consignor at origin and consignee at destination") available at Uhttp://ecprod.cn.ca/ebusiness/eDistribution/english/public/DisplayPage?URL=PriceDocuments?s_icid=PriceDocs-feature-rght-pricedocsU, last visited April 1, 2010;

- Kansas City Southern Railway Company Demurrage and Storage Tariff KCS 6000-E, Item 110(G) ("Demurrage charges will be assessed against the consignor or consignee and they will be responsible for payment of such charges") available at http://www.kcsouthern.com/en-us/Customers/Documents/2009/09-11-09KCS6000ERevision7.pdf, last visited April 1, 2010;

- Soo Line Railroad Company Railcar Supplemental Services Tariff 2, Item 16 ("the Loader of the railcar is assessed at origin and the Un-loader of railcar is assessed at destination. The shipper and consignee will be held ultimately responsible should payment not be forthcoming from the Loader or Un-loader") available at Uhttp://www8.cpr.ca/cms/NR/rdonlyres/edhmk5s6z6zefgf3e6bk7ua6tns2apt7xgccsmje4q3cgpgoztv5hsuzxkp4fcucs2vv3kdltjk6utbld3ymfezxqub/Tariff+2++Railcar+Supplemental+Services++R2010.0.pdfU, last visited April 1, 2010;

(Cont'd)

Furthermore, the tariff has previously been held to be reasonable by the STB. *See Capitol Materials*, 2004 STB LEXIS 227.

Rail Car Shortages Are Cyclical and Frequently Result in National Emergencies

The most important purpose of demurrage, as stated by Congress in 49 U.S.C. § 10746, is to encourage the prompt return of rail cars to service so as to assure an adequate supply for the national rail system. *Novolog*, 502 F.3d at 259 (*citing*, *Pa.R.R.Co. v. Kittanning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323, 40 S.Ct. 532, 64 L.Ed.

(Cont'd)

- CSX Transportation Tariff CSXT 8100, Item 8070(G) ("Unless otherwise advised, in WRITING, that another party is willing to accept responsibility for demurrage, consignor at origin or consignee at destination will be responsible for the payment of demurrage charges") available at Uhttp://www.csx.com/share/customers/tariff/docs/CSXT_8100_Demurrage_Provisions_Section_VIII_as_of_122002-REF10286.pdfU, last visited April 1, 2010;

- BNSF Railway Company BNSF Demurrage Book 6004-A, Item 1005K(F) ("Demurrage charges will be assessed against the consignor or consignee and they will be responsible for payment of such charges") available at Uhttp://newdomino.bnsf.com/website/prices.nsf/55abb888cb03db6286256d7100515608a107fd3ba598a27586257643004d1070/$FILE/Revision%2056.pdfU, last visited April 1, 2010.

928 (1920)). In its published ruling *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 1975 I.C.C. LEXIS 52 (1975), the Interstate Commerce Commission ("ICC")[12] pointed out:

> Car shortages of varying duration and severity have been with us for decades and in every national emergency. They have incurred [*sic*] each year during periods of peak loadings and in about every producing area of the country.

Id., at 787 (citation omitted).

The nation's 563 freight railroads presently maintain a fleet consisting of approximately 1.3 million available rail cars.[13] The cars are heavily used and at various stages of age and repair. Not only are these rail cars a limited and overused commodity, they are a costly asset requiring significant capital to replace. "New freight cars cost between $70,000 and $260,000 depending on the type and features."[14] The average cost of a new freight car purchased by a Class I railroad in 2008 was $95,488.[15] If the flow of rail freight is to continue into the future without interruption, it is essential that rail cars be available for transportation of freight, and not improperly utilized by consignees for storage.

---

[12] See fn. 5, *supra*.

[13] Freight Railroad Statistics, p. 1.

[14] Class I Railroad Statistics, p. 2.

[15] *Id.*

Rail Cars at Issue

NSRC delivered rail cars loaded with freight to respondent, Brampton Enterprises, LLC's ("Brampton") facility in Savannah, Georgia in 2007. *Groves*, 586 F.3d at 1275. The various bills of lading for the freight contained within the rail cars all named Brampton as the sole consignee. *Id.* at 1276. Brampton accepted delivery of the rail cars, and never provided NSRC with any written notice disclosing that it was serving as an agent for other principals. Brampton failed to unload and return the railcars to NSRC within the free time allowed by NSRC's tariff, and consequently Brampton accrued demurrage charges under the terms of NSRC's tariff. *Id.* at 1275. None of the aforementioned facts are in dispute. *Id.* at 1275-77.

Brampton admits that it was the named consignee on the bills of lading, and does not contend that it provided NSRC with notice that it was an agent for any disclosed principals. *Id.* at 1276. Brampton contends only that it never agreed with any shippers to be named as consignee, nor did it receive written notice prior to delivery that it was named as consignee on the various bills of lading. *Id.*

Proceedings Below

NRSC filed this lawsuit against Brampton to recover rail car demurrage charges which accrued under the terms of its governing tariff. NSRC's Amended

Complaint ("Amended Complaint"), Docket No. 41, ¶ 8.[16] Brampton's sole defense to the claim was that it never agreed with any shipper to be named as the consignee on the bills of lading, and never received notice prior to delivery that it was named as consignee on the bills of lading. *Groves*, 586 F.3d at 1276.

The district court granted Brampton's motion for summary judgment, holding that, notwithstanding the definition provisions of NSRC's tariff, Brampton could not be a true consignee unless it could be proven that Brampton consented to being named consignee, or had notice prior to delivery that it was named as consignee. *Id.* at 1282.

On appeal, the Eleventh Circuit affirmed and adopted the ruling of the district court. *Id.* The Eleventh Circuit conceded that its ruling directly conflicted with a ruling of the Third Circuit, but principally relied on decisions which only discussed the liability of disclosed agents named as consignee. *Id.* at 1280-81.

Jurisdiction of the Courts Below

NSRC seeks review of the decision of the Eleventh Circuit. The Eleventh Circuit had jurisdiction over this matter pursuant to 28 U.S.C. § 1291, as a timely appeal was filed by NSRC. The district court had jurisdiction over the claims pled in this case pursuant to 28 U.S.C.

---

[16] 8. The assessed demurrage charges were determined and made applicable pursuant to tariffs, rules and rates promulgated and published in accordance with 49 U.S.C. § 10746." Amended Complaint, ¶ 8.

§ 1337 as a cause of action arising under the I.C.A., 49 U.S.C. §§ 10101 *et seq.* The Eleventh Circuit and district court possessed subject matter jurisdiction to apply the unambiguous terms of the tariff and to resolve questions of fact relating to the application of the tariff. However, to the extent that the Eleventh Circuit's decision has the effect of interpreting and/or reforming the terms of the tariff, the Eleventh Circuit's remedy raises an interesting jurisdictional issue. Matters of tariff interpretation, extrapolation, and reformation are reserved to the exclusive jurisdiction of the STB.

REASONS FOR GRANTING THE PETITION

Congress clearly stated that it is the United States Government's policy "to ensure the development and continuation of a sound rail transportation system to meet the needs of the public and the national defense." 49 U.S.C. §10101(4). The Courts have stressed the need for uniformity with respect to the costs and liabilities for national rail freight transportation. *Pittsburgh, C.C., & St. Louis Ry. Co. v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919). Consistency and uniformity result in the nondiscriminatory treatment of rail customers, and assure that the nation's 563 different freight railroads operate as one system.

Congress, as part of these same policy objectives, has also stressed the essential need for an adequate supply of rail cars to assure continuous operation of a national rail system. To this end, Congress has required the railroads to collect demurrage pursuant to tariffs

to promote rail car efficiency, and to avoid having rail cars sidelined as storage facilities.[17]

This case presents a critical issue which the Circuit Courts have considered and issued diametrically opposed rulings on. This conflict threatens to fractionalize the operation of a uniform national system into a rail system of geographic circuits, where the rules of liability and rail car handling differ and vary depending upon the location of the rail cars. Moreover, the decision of the Eleventh Circuit will result in a profoundly different set of rules and obligations for rail deliveries made within this particular Circuit, as rail carriers there now have the additional burden of investigating and confirming the identity of the true and consenting consignee before delivering loaded rail cars – but only for deliveries made within this particular Circuit.

This case also presents important questions of subject matter jurisdiction, as the Eleventh Circuit's

---

[17] *See Novolog*, 502 F.3d at 259 (*citing Kittanning*, 253 U.S. at 323) (the most important purpose of demurrage is to encourage the prompt return of freight cars to service so as to guarantee the steady flow of rail freight). Congress's concern with ensuring that rail cars be available for transportation and not sidelined or improperly used as storage facilities is reflected in 49 U.S.C. § 10746 which requires rail carriers to compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to — (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property. *Novolog*, 502 F.3d at 259-60; *Groves*, 586 F.3d at 1276 (*citing* 49 U.S.C. § 10746).

decision is the clear result of the court's interpretation and expansion of the terms of a rail carrier's tariff, notwithstanding the express and exclusive jurisdiction afforded to the STB by Congress.

A. This Court Should Grant the Petition in Order to Resolve the Direct Conflict Between the Decisions of the Third and Eleventh Circuits Which Threatens to Transform a National Rail System into a Rail System of Different Circuits

The Eleventh Circuit recognized and announced that its holding was directly at odds with the holding of the U.S. Court of Appeals for the Third Circuit in *Novolog. Groves*, 586 F.3d at 1280-81. Thus, if Brampton was physically located in the Third Circuit, it would be liable for the rail car demurrage claimed in this case.

The Third Circuit interpreted § 10743(a)(1)[18] as providing that "the named consignee [on a bill of lading] becomes a party to the transportation contract upon receipt of the freight and is thereafter liable for all relevant charges." *Novolog*, 502 F.3d at 255-56. The Third Circuit identified three reasons for reaching this holding. *Id.* at 257-59. The Eleventh Circuit's decision re-states those three reasons but rejects the ultimate

---

[18] Section 10743(a)(1) provides consignees identified on a bill of lading a defense to liability for demurrage charges. Brampton does not claim that the statutory defense provided by § 10743 is applicable in this case. The particulars of the defense are discussed in fn. 25, *infra*.

conclusion without discussion of the Third Circuit's reasons or application of those reasons to the facts in this case. *Groves*, 586 F.3d at 1280-81. The Eleventh Circuit summarily rejected the Third Circuit's analysis and held that "the *Novolog* rule of presumptive liability cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties." *Id.* at 1281. The Eleventh Circuit inexplicably failed to mention the fact that there is no evidence that the consignee in *Novolog* received such notice as it: (1) did not assent to being named consignee in the bills of lading, and; (2) did not prepare any of the bills. *Novolog*, 502 F.3d at 252, 254, 256, 257. Thus, the Eleventh and Third Circuits reached opposite legal conclusions regarding demurrage liability under nearly identical facts. The parties alleged to be liable for demurrage in each case: (1) did not have a beneficial ownership interest in the freight at issue; (2) were identified as consignee on the relevant bills of lading; (3) did not prepare those bills of lading; (4) did not consent to being named as consignee on the bills of lading, and; (5) did not give notice to the rail carrier that they were acting as an agent only.

The consignee in *Novolog* petitioned this Court for issuance of a writ of certiorari following the Third Circuit's decision. 128 S. Ct. 1240 (2008). The *Novolog* consignee argued that there was a conflict between the *Novolog* decision and the law of another Circuit citing the Seventh Circuit's decision in *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir.

2003).[19] While that argument alleging a conflict among the Circuits on this important issue certainly proved to be prescient, the conflict was simply percolating at that point. Now, however, a true and compelling conflict does exist. The matter is ripe for resolution by this Court, and resolution is warranted.

This Court recognized that: "The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars. The duty of loading and of unloading carload shipments rests upon the shipper or consignee." *Kittanning*, 253 U.S. at 323. The rationale behind the policy is clearly to avoid rail car shortages when shippers present increasing demands upon rail carriers. *See Car Demurrage Rules*, 350 I.C.C. 777. The ICC has repeatedly dealt with cyclical rail car shortages, and pointed out: "Car shortages of varying duration and severity have been with us for decades and in every national emergency." *Id.* (Citation omitted).

---

[19] The Eleventh Circuit noted a conflict of authority on the issue presented herein between the Third and Seventh Circuits. *Groves*, 586 F.3d at 1280. Both *Novolog* and the Eleventh Circuit's decision discuss the Seventh Circuit's decision in *South Tec*. The Court in *South Tec* analyzed a demurrage dispute and posed the question of whether a warehouseman was a consignee. *South Tec*, 337 F.3d at 817, 820. The Eleventh Circuit acknowledges that the Seventh Circuit never answered this question. *Groves*, 586 F.3d at 1280. In fact, the Seventh Circuit remanded the question to the district court for resolution. However, the question was never answered as the matter was settled following remand. While the Seventh Circuit's treatment of the issue signaled a prelude to the current division of authority, it failed to resolve the issue and thus stopped short of creating a Circuit split.

Should the current conflict be allowed to over-ripen, the effect on the rail freight transportation network could be costly to industries across the economic landscape. Rail carriers will not be compensated for use of their assets and opportunities to transport the goods of others will be lost. Named consignees who deny consenting to be so named will have no incentive to return rail cars promptly, and will be at liberty to misuse them as free storage facilities. Like the rail carriers, other companies relying on the rail transportation network will be at the mercy of "non-consenting" consignees [20] in some, but not all Circuits. The statutory objective of ensuring that rail cars are efficiently and properly utilized will have failed, but only in certain locations.

The Circuit split created by the Eleventh Circuit's decision undermines the intended uniformity of interstate commerce. Notwithstanding clear Congressional intent to abolish disparate treatment of entities in identical factual circumstances, this is precisely what is evolving from the conflicting rulings. [21]

---

[20] Whether the shippers' agent who may have identified Brampton as the consignee on the bills of lading is liable, in turn, to Brampton for misidentifying it as consignee, or under the terms of their contractual relationship, is a separate question.

[21] Providing identical services at different rates for different customers is prohibited by the I.C.A. Section 10741(a) provides that a "rail carrier . . . may not subject a person, place, port, or type of traffic to unreasonable discrimination. . . . For purposes of this section, a rail carrier engages in unreasonable discrimination when it charges or receives from a person a (Cont'd)

The Eleventh Circuit's decision results in a judicial failure to provide parties to transactions involving interstate commerce with clear, easily enforceable rules, particularly with respect to rail car use and possession. *Novolog*, 502 F.3d at 257, 258. The conflicting duties, responsibilities and liability imposed by the Eleventh Circuit's decision here, and the Third Circuit's decision in *Novolog*, result in a situation where rail users receiving identical services under identical circumstances will be subject to different liabilities, or rail carriers providing identical services will bear different burdens in order to collect identical charges. The Eleventh Circuit's decision thus constitutes a departure from the accepted and usual course of judicial proceedings, and calls for an exercise of this Court's power to resolve the Circuit split on this important question.

B. This Court Should Grant the Petition Because the Eleventh Circuit Did Not Have Jurisdiction to Render a Decision That Interprets the Provisions of a Rail Carrier's Demurrage Tariff

The claim asserted by NSRC in the district court presented a single, straightforward question: is Brampton liable for demurrage under NSRC's tariff? Amended Complaint, ¶ 8.

(Cont'd)
different compensation for a service rendered, . . . than it charges or receives from another person for performing a like and contemporaneous service . . . under substantially similar circumstances." 49 U.S.C. § 10741(a).

The provisions of the tariff are not in dispute. "Demurrage charges will be assessed against the consignor at origin or the consignee at destination who will be responsible for payment." Tariff, Item 850 (5); *Groves*, 586 F.3d at 1276. When used in the tariff, the term "consignee" means "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment." Tariff, Item 200 (6). Federal statutory law, decisional law of courts, decisions promulgated by the STB and its predecessor the ICC, as well as commercial practice and common usage all define consignee in a manner consistent with the tariff. *See Groves*, 586 F.3d at 1276 n. 3.[22] The Eleventh Circuit's novel definition of consignee which requires proof of consent before delivery is irreconcilable with historical, legal and commercial practice and precedent.

The relevant facts are not in dispute. Brampton was named as the consignee on the bills of lading relating to the shipments at issue. *Id.* at 1276. The demurrage at issue accrued at rail destination – namely, Brampton's facility. *Id.* at 1275. As to the shipments at issue, it is undisputed that Brampton received and accepted all of the rail cars loaded with freight. Accordingly, applying the plain and literal terms of the tariff, Brampton is liable for demurrage accruing after delivery.

---

[22] *See* 49 U.S.C. § 80101(1); *and see Black's Law Dictionary*, p. 327 (8th ed. 2004); *and see Black's Law Dictionary*, p. 307 (6th ed. 1990); *and see Novolog*, 502 F.3d at 257 (*citing Webster's Third New International Dictionary* (1971)); *and see Novolog*, 502 F.3d at 258 n. 11 (*citing* U.C.C. § 7-102(a)(3)); *and see Novolog*, 502 F.3d at 262; *and see ICC Ametek*, 1993 ICC LEXIS 13, *16-17, 20-21; *and see Merriam-Webster Online Dictionary*. 2009. Retrieved November 17, 2009, from http://www.merriam-webster.com/dictionary/consignee.

To the extent that questions are raised regarding the enforceability or reasonableness of the terms of any rail carrier's tariff,[23] those questions fall exclusively within the jurisdiction of the STB. [24] Where demurrage is assessed pursuant to a tariff, it is subject to Board regulation under 49 U.S.C. § 10702. *PCI Transp.*, 2008 STB LEXIS 218, *1; *South Tec*, 2000 STB LEXIS 666, *6-7; *see Capitol Materials*, 2004 STB LEXIS 227, *3; *see also Unger*, 2000 STB LEXIS 333, *6. Even the Eleventh Circuit recognized that the assessment of demurrage charges and issuance of demurrage rules by rail carriers is "subject to oversight by the Surface Transportation Board." *Groves*, 586 F.3d at 1276; 49 U.S.C. § 10501(b).

It is clear that Congress intended for a broad grant of jurisdiction to the STB over railroad transportation

---

[23] Notably, the STB has previously held that the rate of demurrage charged and the method of calculating demurrage under the tariff at issue here, *i.e.*, Tariff NS 6004-B, is reasonable under 49 U.S.C. § 10702. *Capitol Materials*, 2004 STB LEXIS 227, *9-10. Equally notable is the fact that the rail user who challenged the tariff in *Capitol Materials* accrued demurrage under the tariff at a facility located in the Eleventh Circuit (*i.e.*, Fulton County, Georgia).

[24] 49 U.S.C. § 10501(b); *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 538, 540 (5th Cir. 2005); *see also Illinois Central R.R. v. South Tec Development Warehouse*, No. 97 C 5720, 1999 U.S. Dist. LEXIS 11222,* 4-6 (N.D. Ill. July 16, 1999) (*citing U.S. v. Western Pac. R.R.*, 352 U.S. 59, 63, 77 S. Ct. 161, 1 L. Ed. 2d 126(1956); *and see PCI Transportation, Inc. v. Fort Worth & Western R.R. Co.*, 2008 STB LEXIS 218, STB Docket No. 42094 (Sub-No. 1), *10-11 (STB served April 25, 2008).

and rail carriers. *See CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). It is equally clear that 49 U.S.C. § 10501 provides that the STB's jurisdiction over rules regarding rail car demurrage established by rail carriers under the I.C.A. is exclusive. *See* fn. 24, *supra*. The exclusivity of the STB's jurisdiction is warranted due to the fact that the STB is "uniquely qualified" to resolve such issues. *South Tec*, 1999 U.S. Dist. LEXIS 11222, * 5.[25]

The Eleventh Circuit held that Brampton was not a consignee, and therefore not liable for demurrage. Based upon the claim asserted by NSRC, the Eleventh Circuit's decision can only be understood as holding that Brampton was not a consignee as that term is used in the tariff, and therefore not liable for demurrage. [26] By

---

[25] In *Novolog*, the Third Circuit held that the STB's jurisdiction is primary, as opposed to exclusive, when demurrage charges are assessed "under an agreement – namely, the transportation contract." *Novolog*, 502 F.3d at 250, 252-53. When demurrage is assessed under a tariff, the STB's jurisdiction is exclusive, rather than simply primary. *See* fn. 24, *supra*. Objections to subject matter jurisdiction based upon an argument that the STB's jurisdiction is exclusive can be raised at any point. *Novolog*, 502 F.3d at 253 (*citing Northwest Airlines v. County of Kent*, 510 U.S. 355, 366 n. 10, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994)) (further citations omitted).

[26] There are two defenses that would render Brampton, or any consignee identified on a bill of lading, not liable for demurrage notwithstanding the terms of the tariff. Neither, however, is applicable in this case. First, Brampton could have refused to accept delivery of the freight. *See Groves*, 586 F.3d at 1280; *Novolog*, 502 F.3d at 259. Here, it is undisputed that

(Cont'd)

issuing a decision which expressly, or implicitly, interprets the terms of the tariff, the Eleventh Circuit infringed upon the exclusive jurisdiction of the STB and rendered a judgment beyond its power.

C. The Eleventh Circuit's Decision Imposes an Unclear and Unworkable Rule Upon the Interstate Rail Network and Constitutes a Departure from the Accepted and Usual Course of Judicial Proceedings Which Calls for an Exercise of This Court's Power

The Eleventh Circuit's novel definition of consignee leaves carriers with different rules which vary by location of delivery. Worse yet, the rules for demurrage in the Eleventh Circuit are now, as a practical matter, unworkable.

(Cont'd)
Brampton accepted delivery of the freight. Second, an entity identified as a consignee on a bill of lading who accepts delivery of freight is not liable for demurrage accrued at rail destination if: (1) the consignee is an agent only, not having beneficial title to the property, and; (2) the consignee gives written notice to the delivering carrier before delivery of the property of the agency and absence of beneficial title and the name and address of the beneficial owner of the property. 49 U.S.C. § 10743(a)(1); *Novolog*, 502 F.3d at 259; *Groves*, 586 F.3d at 1279. It is not disputed that Brampton: (1) is identified as the consignee on the bills of lading at issue; (2) accepted delivery of the rail cars at issue, and; (3) did not provide NSRC written notice prior to delivery asserting that Brampton was an agent without beneficial title to the freight. Accordingly, neither of the defenses available to Brampton is even alleged to be applicable in this case. Thus, the Eleventh Circuit's opinion must be construed as holding that Brampton is not liable under the tariff because it is not a consignee, regardless of the tariff's terms.

In practice, there is no reason for any party who accepts delivery of freight to expressly admit that they consent to being identified as the consignee on a bill of lading. A rail carrier has no choice but to deliver freight to the party named on a bill of lading as consignee. *Novolog*, 502 F.3d at 259. The named consignee can accept delivery of the freight and then take the position that it did not consent to being "named" consignee, and retain possession of the rail cars for storage purposes. This would leave the rail carriers with no one to charge with demurrage at destination, as is the case here, and no entity being qualified to be the consignee.

Under the Eleventh Circuit's rule, if a named consignee claims that it did not consent to being so named, the burden shifts to the rail carrier to prove that party consented in advance to being named as consignee on the bill of lading. This would presumably be accomplished by having the railroad physically serve the consignee with notice and obtain acceptance before delivery.[27] However, charging rail carriers with the obligation of notifying receivers of their designation as consignee before making delivery proves equally problematic.

There are two types of bills of lading: negotiable (formerly order) bills of lading and nonnegotiable (formerly straight) bills of lading. 49 U.S.C. § 80103. Both types of bills are given to the railroad by the

---

[27] In the 21st century, rail carriers typically do not receive or maintain paper bills of lading; the shipper typically notifies the rail carrier electronically of the consignee's identity and location.

consignee at delivery. Negotiable bills of lading grant the **holder** the right to take possession of the freight identified therein. 49 U.S.C. § 80110(b)(3) (emphasis supplied). Like a dry cleaning ticket, the negotiable bill of lading is traded for possession of the goods. Even with nonnegotiable bills of lading, a "carrier must deliver goods covered by a bill of lading on demand of the consignee named in a nonnegotiable bill . . . when the consignee . . . (1) offers . . . to satisfy the lien of the carrier on the goods; (2) **has possession of the bill** . . . ; and (3) agrees to sign, on delivery of the goods, a receipt for delivery." 49 U.S.C. § 80110(a) (emphasis supplied). Thus, in addition to running upstream of centuries of commercial practice, forcing a rail carrier to provide copies of a bill of lading to a consignee before delivery has practical and legal obstacles. With respect to negotiable bills, the carrier, like the analogous dry cleaner above, waits for the customer/consignee to produce its copy of the bill of lading before surrendering possession of the goods. With respect to nonnegotiable bills, the law presupposes that the consignee "has possession of the bill" before delivery is made. A rule which obligates the carrier to supply the consignee with the bill of lading prior to delivery quite literally turns the law on its head.

In addition to the practical and legal problems engendered by the Eleventh Circuit's novel definition of consignee, the definition is at odds with definitions found in, *inter alia*:

- the tariff at issue which has previously been subjected to review by the STB ("[t]he party to whom a shipment is

consigned or the party entitled to receive the shipment");[28]

- *Novolog* ("an entity named on a bill of lading as the sole consignee, without any designation clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers");[29]

- the Federal Bill of Lading Act ("the person named in a bill of lading as the person to whom the goods are to be delivered");[30]

- ICC decisions regarding demurrage liability;[31]

- the Uniform Commercial Code ("a person named in a bill of lading to which or to whose order the bill promises delivery");[32]

- Black's Law Dictionary ("[p]erson named in bill of lading to whom or to whose order

---

[28] Tariff NS 6004-B, Item 200(6); *see Capitol Materials*, 2004 STB LEXIS 227.

[29] *Novolog*, 502 F.3d at 262.

[30] 49 U.S.C. § 80101(1).

[31] *ICC Ametek*, 1993 ICC LEXIS 13, *16-17, 20-21.

[32] *Novolog*, 502 F.3d at 258 n. 11 (*citing* U.C.C. § 7-102(a)(3)).

the bill promises delivery")[33] and ("[o]ne to whom goods are consigned");[34]

- common usage ("one to whom something is consigned or shipped");[35] and even,

- dicta in the Eleventh Circuit's own decision ("[a]s previously defined, a consignee is the party designated to receive a shipment of goods").[36]

The consistency of the definitions provided by the sources above is striking. However, these similarities are not surprising given Congress' stated intent of uniformity and consistency in matters relating to interstate rail transportation. Assuming *arguendo* that it was within the Eleventh Circuit's jurisdiction to create its own novel definition of consignee for purposes of determining Brampton's liability for demurrage under the tariff, the definition created by the Eleventh Circuit fails to even define who is a consignee. It merely defines who may not be a consignee. Thus, the novel definition promulgated by the Eleventh Circuit fails to provide a "clear, easily enforceable" rule as required by the I.C.A. *Novolog*, 502 F.3d at 257, 258.

---

[33] *Black's Law Dictionary*, p. 307 (6th ed. 1990).

[34] *Black's Law Dictionary*, p. 327 (8th ed. 2004).

[35] *Novolog*, 502 F.3d at 257 (*citing Webster's Third New International Dictionary* (1971)); *Merriam-Webster Online Dictionary*. 2009. Retrieved November 17, 2009, from http://www.merriam-webster.com/dictionary/consignee.

[36] *Groves*, 586 F.3d at 1281.

The rejection of consistent, widely accepted definitions of consignee within the Eleventh Circuit destroys the uniformity and consistency in matters relating to interstate rail transportation. The Eleventh Circuit's decision thus creates a Circuit split and constitutes a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power with respect to resolution of this important question.

CONCLUSION

The Eleventh Circuit has decided an important question of federal law that has not been, but now must be, settled by this Court. The Eleventh Circuit readily acknowledges that its decision directly conflicts with a recent decision of the Third Circuit. If permitted to stand, the Eleventh Circuit's decision will result in a disjointed and regional freight rail system, instead of the national rail system mandated by Congress. Furthermore, it is highly questionable that the Eleventh Circuit possessed jurisdiction to render the decision as issued. Accordingly, petitioner respectfully requests that this Court issue a writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit in this matter and either vacate or reverse the decision of the Eleventh Circuit.

Respectfully submitted,

PAUL D. KEENAN
KEENAN COHEN & HOWARD P.C.
One Pitcairn Place
165 Township Line Road
Suite 2400
Jenkintown, PA 19046-3535
(215) 609-1110
pkeenan@freightlaw.net
Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 2, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-15418

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff-Appellant,

versus

BILLY GROVES, individually, d.b.a. Savannah Re-Load, SAVANNAH RE-LOAD, et al.,

Defendants,

BRAMPTON ENTERPRISES, LLC, d.b.a. Savannah Re-Load,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

(November 2, 2009)

Appendix A

Before CARNES, FAY and ALARCÓN,* Circuit Judges.

FAY, Circuit Judge:

This appeal arises from a dispute between a rail carrier and a warehouseman regarding liability for demurrage, *i.e.*, penalties assessed for the undue detention of rail cars. Norfolk Southern Railway Company sued Brampton Enterprises, LLC d/b/a Savannah Re-Load for demurrage accrued over the six month period from March to August 2007. Savannah Re-Load denied liability for the demurrage charges and, despite being named as consignee on the bills of lading, maintained it was not a party to the shipping contracts. Norfolk Southern asserts that as the named consignee Savannah Re-Load became a party to the contracts by accepting the shipments. The district court granted summary judgment in favor of Savannah holding that a freight re-loader cannot, without notice, be made a consignee by the unilateral action of a third party. We affirm.

I.

Brampton Enterprises operates a warehouse business under the trade name Savannah Re-Load ("Savannah"). As a warehouseman, Savannah receives freight at its facility, unloads it from the containers in which it arrives, reloads it into appropriate containers

---

* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

for export, and forwards it to various ports according to instructions received from the freight forwarder. Savannah has no ownership interest in the freight it handles and is not a party to the transportation contracts. The freight forwarding companies make transportation arrangements without input from or notice to Savannah.

In late 2006 Galaxy Forwarding ("Galaxy") began sending freight to Savannah's facility via railcar delivered by Norfolk Southern Railway Company ("Norfolk"). According to Savannah owner William "Billy" Groves, Galaxy was aware of Savannah's operational capacity and controlled the amount of freight it received. Galaxy merely informed Savannah when shipments were en route and provided it with instructions regarding the export of the shipment. Galaxy was the only freight forwarder to send Savannah freight via rail and arranged transportation for all the freight shipments at issue. These freight shipments originated from various domestic shippers and were being exported to overseas recipients by Galaxy. Savannah had no knowledge of the origins or final destinations of the freight it handled.

Norfolk transported the rail freight to Savannah pursuant to bills of lading[1] received from Galaxy. Before

1. A bill of lading is "the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers." *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342, 102 S. Ct. 1815, 1820, 72 L. Ed. 2d 114 (1982).

rail cars were delivered, Norfolk would notify Savannah that rail cars from certain shippers had arrived and were ready for delivery. Once Savannah approved the delivery, Norfolk would perform a "switch" by removing any empty rail cars and replacing them with new rail cars to unload. Norfolk would perform only one "switch" per day delivering as many as five cars at a time.

Beginning in March 2007, Galaxy began sending rail freight to Savannah at such a volume that demurrage began to accrue. Pursuant to Norfolk's tariff, a customer is allowed two days to unload freight without incurring demurrage. At the end of each month, a customer's total demurrage days are netted against total credits. Credits are calculated by multiplying the number of rail cars delivered during a particular month by two, which accounts for the two "free" days all customers are given to unload delivered rail cars. If total demurrage exceeds total credits, those days are charged at the daily rate published in Norfolk's tariff.

The right to assess detention or demurrage charges against parties to a transportation contract for delay in releasing transportation equipment is well established at common law. Motor carriers term such a delay as detention while rail carriers refer to it as demurrage. Prior to rail transport, demurrage was recognized in maritime law as the amount to be paid for delay in loading, unloading, or sailing beyond the time specified. Unlike maritime law, a railroad carrier can collect demurrage even if the shipping contract contains no provision to that effect. In the railroad setting,

demurrage charges serve a twofold purpose: "One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 271 U.S. 259, 262, 46 S. Ct. 530, 531, 70 L. Ed. 934 (1926). As such, demurrage charges are properly assessed even if the cause for the delay is beyond the party's control, unless the carrier itself is responsible for the delay.

While demurrage remains a matter of contract, railroads are now required by federal statute to assess demurrage charges subject to oversight by the Surface Transportation Board. Norfolk seeks demurrage charges against Savannah pursuant to the Interstate Commerce Commission Termination Act (ICCTA), requiring rail carriers to "compute demurrage charges, and establish rules related to those charges . . ." 49 U.S.C. § 10746 (1995). Norfolk publishes the applicable demurrage rules and charges in Freight Tariff NS 6004-B, which states in relevant part that "[d]emurrage charges will be assessed against the consignor[2] at origin or consignee[3] at destination who will

---

2. A consignor is "[o]ne who dispatches goods to another on consignment." Black's Law Dictionary 327 (8th ed. 2004). A consignment is "[a] quantity of goods delivered by this act, esp. in a single shipment." Black's Law Dictionary 327 (8th ed. 2004).

3. A consignee is "[o]ne to whom goods are consigned." Black's Law Dictionary 327 (8th ed. 2004). The Federal Bills of

(Cont'd)

be responsible for payment." Tariff NS 6004-B, Item 850(5) (2000) (footnotes added). Thus, Norfolk is required by the ICCTA and the terms of its own tariff to assess demurrage charges against the shipment's consignee for any delay in unloading the rail cars at their destination.

Savannah was a named consignee on the bills of lading for the freight shipments at issue. However, many of these bills of lading also named an ultimate consignee and printed copies of the electronic bill of lading data submitted by Norfolk did not actually contain the word consignee. Savannah maintains that it did not consent to being named on the bills of lading and was never informed that any bill of lading identified it as a consignee. The record indicates that neither Galaxy, Norfolk, nor any other entity provided Savannah with the bills of lading for the freight it handled. Thus, Savannah was a named consignee on the bills of lading without notice of, or consent to, such designation.

In addition to the freight at issue in this appeal, Norfolk routinely delivered freight to Savannah's facility pursuant to bills of lading where Savannah was not the

---

(Cont'd)

Lading Act and Norfolk's Tariff define consignee in a consistent manner. *See* 49 U.S.C. § 80101(1) (1994) ("'consignee' means the person named in a bill of lading as the person to whom the goods are to be delivered"); Tariff NS 6004-B, Item 200(6) (2000) ("The party to whom a shipment is consigned or the party entitled to receive the shipment").

named consignee. The instant dispute arose when Norfolk began invoicing Savannah for demurrage on all shipments delivered to Savannah's facility irrespective of whether Savannah was the named consignee. Savannah refused to pay and in late 2007 Norfolk sued for demurrage on all shipments, without regard for who was named as consignee. After Savannah moved for summary judgment, Norfolk amended its complaint, to exclude demurrage for freight shipments where Savannah was not named as consignee. This amendment had the effect of reducing Norfolk's demand from $ 133,080.00 to $ 70,680.00.

In early 2008 Savannah moved for summary judgment on all claims arguing that it was not liable for demurrage because Norfolk could "only recover demurrage against a consignee or a party to the transportation contract." Savannah stated that "the issue before the Court is whether another's unilateral act of identifying 'Savannah Re-Load' as the consignee without [its] knowledge or permission is sufficient to make it a consignee and therefore liable for demurrage." Norfolk moved for partial summary judgment as to the issue of Savannah's liability for demurrage. Norfolk argued that Savannah was liable for demurrage because Savannah was identified as consignee on the bills of lading at issue, Savannah accepted delivery of the rail cars and the freight, and Savannah did not notify Norfolk of its agent status.

The district court granted Savannah's motion for summary judgment and denied Norfolk's motion for

partial summary judgment, holding that Savannah was not liable for demurrage. The court stated that a bill of lading is essentially a contract and Savannah could not be made a party to that contract without its knowledge or consent. In sum, the court held that Savannah "cannot be made a consignee by the unilateral action of a third party, particularly where Savannah Re-Load was not given notice of the unilateral designation in the bills of lading." Norfolk appeals the district court's denial of its motion for partial summary judgment and grant of summary judgment to Savannah.

II.

We review a district court's grant or denial of summary judgment *de novo*, considering all the facts and reasonable inferences in the light most favorable to the nonmoving party. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Landstar Sys. Inc.*, 541 F.3d 1278, 1287 (11th Cir. 2008). Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323, 106 S. Ct. at 2553 (internal quotations omitted). If the movant succeeds in demonstrating the absence of a material issue of fact, the burden shifts to the non-movant to show the existence of a genuine issue of fact. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993).

A. Demurrage liability

We begin our analysis by examining the basis for the district court's decision, and in doing so, review several fundamental principles of law that define demurrage liability. First, demurrage is considered part of the transportation charge and under the tariff system is imposed as a matter of law. However, "[b]efore such transportation-related assessments such as detention charges can be imposed on a party . . . there must be some legal foundation for such liability outside the mere fact of handling the goods shipped." *Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1118 (D.D.C. 1972) (three-judge panel).[4] In *Evans Prods. Co. v. Interstate Commerce Comm'n*, the Seventh Circuit held that "[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom." 729 F.2d 1107, 1113 (7th Cir. 1984) (citations omitted); *see also S. Pac. Transp. Co. v. Matson*

4. We note that research has disclosed very few opinions by federal circuit courts dealing with the narrow issue presented in this case. Thus, we have cited those authorities that are available.

Navigation Co., 383 F. Supp. 154, 156 (N.D. Cal. 1974) ("The obligation to pay demurrage arises either out of contract, statute or prevailing custom"); *Middle Atl.*, 353 F. Supp. at 1118 (liability for demurrage "must be founded either on contract, statute or prevailing custom"). Norfolk has not offered any evidence of prevailing industry custom or applicable statute that would hold non-parties to a shipping contract liable for demurrage. Furthermore, it is undisputed that Savannah is neither consignor nor owner of the freight. Thus, Savannah is liable for demurrage only if it were the consignee or contractually assumed responsibility for the charges.

A freight handler such as Savannah is free to contractually assume liability for demurrage charges and "this is sometimes done through average demurrage agreements to promote their own business and in some instances to obtain the benefits of lower detention costs for the benefit of their customers." *Middle Atl.*, 353 F. Supp. at 1122. However, in the instant case, there is no evidence to suggest that Savannah independently contracted with either Norfolk or Galaxy regarding demurrage charges. This leaves us only with the question of Savannah's consignee status to determine demurrage liability.

As mentioned previously, the bill of lading is the basic transportation contract between the shipper-consignor and the carrier. Thus, as an original party to the shipping contract, a consignor is clearly liable for demurrage. However, "a consignee's liability is quasi-contractual, and

arises by operation of law when the consignee accepts delivery of the goods . . ." *Consol. Rail Corp. v. Com., Pa. Liquor Control Bd.*, 90 Pa. Commw. 595, 496 A.2d 422, 424 (Pa. Cmwlth. 1985). *See also Pittsburgh v. Fink*, 250 U.S. 577, 581, 40 S. Ct. 27, 63 L. Ed. 1151 (1919) ("The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier"). By accepting delivery of a shipment, the consignee's conduct assumes a quasi-contractual significance by virtue of the transportation contract, which identifies the parties and assigns responsibility for particular charges. The contract implied from the acceptance of a shipment extends no further than the conditions upon which its delivery is made dependant. Unless the bill of lading provides to the contrary, the consignor remains primarily liable for the freight charges and pursuant to the carrier's tariff, the consignee becomes liable for demurrage charges at the freight's destination. Thus, only an original party to the rail transportation contract, or a consignee by virtue of acceptance of the goods, may be liable for demurrage. As a district court in our circuit put it, "all the reported opinions agree that only a party to the rail transportation contract may be liable for demurrage." *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F. Supp. 880, 884 (N.D. Fla. 1995); *see also Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir. 1997) (holding demurrage could not be assessed against a warehouse that was not a consignee or other party to the transportation contract); *Matson*, 383 F. Supp. at 156 (the obligation to pay demurrage "arises out of the

contractual relationship and may only be imputed to parties to the contract"); *Middle Atl.*, 353 F. Supp. 1109 (finding a carrier's proposed tariff unlawful to the extent that it attempted to impose liability for demurrage charges on non-parties to the transportation contract); *Missouri, K. & T. Ry. Co. of Texas v. Capital Compress Co.*, 50 Tex. Civ. App. 572, 110 S.W. 1014, 1016 (Tex. Civ. App. 1908) (holding a cotton compress company not liable to carrier for demurrage because "[t]he findings of fact fail to show any contractual relation between them in reference to the shipment of the cotton").

There are exceptions to a consignee's demurrage liability. A consignee may avoid demurrage liability by notifying the carrier of its agency status prior to accepting delivery of the shipment. "The law is well settled that an agent for a disclosed principal is not liable to a third person for acts within the scope of agency." *Middle Atl.*, 353 F. Supp. at 1120-21; *See also Whitney v. Wyman*, 101 U.S. 392, 396, 25 L. Ed. 1050 (1879) ("Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so"). The ICCTA recognizes the common law rule of agency and provides in relevant part:

> When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is

> otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—
>
> > (A) of the agency and absence of beneficial title; and
> >
> > (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743(a)(1) (1995). Thus, an agent-consignee can avoid demurrage liability by notifying the carrier of its agency status and providing the carrier with the name and address of the shipment's beneficial owner prior to accepting delivery.

Thus far our analysis has surveyed the undisputed aspects of demurrage liability. The parties agree that an entity must be a party to the transportation contract to be liable for demurrage charges, that a consignee becomes a party to the transportation contract upon accepting the freight consigned to it, and that a consignee may avoid demurrage liability by disclosing its agency status prior to accepting delivery of the shipment. We now turn to the key question of whether Savannah was a consignee in the context of this case.

Appendix A

B. A consignee by any other name . . .

The issue before the court is whether Savannah was a consignee of the freight delivered by Norfolk. Norfolk contends that Savannah was a consignee because it was identified as such on the bills of lading and accepted delivery of the shipments. Savannah argues that it cannot be made a consignee merely because a third party unilaterally listed it as such without its knowledge or consent. Both the Seventh and Third Circuits have addressed this issue in cases involving similar fact patterns. *See Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003); *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007), *cert denied*, 552 U.S. 1183, 128 S. Ct. 1240, 170 L. Ed. 2d 65 (2008). The Seventh and Third Circuits reached differing conclusions on this issue resulting in a conflict of authority among the two circuits. *See South Tec*, 337 F.3d at 821; *Novolog*, 502 F.3d at 262.

In *South Tec*, the Seventh Circuit reasoned that the preliminary issue was whether the defendant warehouseman was a consignee. Although the case was remanded to the district court for determination of the warehouseman's status, the Seventh Circuit stated that "being listed by third parties as a consignee on some bills of lading is not alone enough to make [a warehouseman] a legal consignee liable for demurrage charges . . . ." *South Tec*, 337 F.3d at 821.

Like *South Tec*, the defendant in *Novolog*, who was named as consignee without its authorization, argued

that "the shipper's or carrier's unilateral decision to designate [it] as the consignee, without [it]'s permission and where [it] is not the ultimate consignee of the freight, cannot establish its status as a consignee for purposes of demurrage liability under the statute or otherwise." *Novolog*, 502 F.3d at 257. The Third Circuit disagreed for three reasons. *See id.* First, because "nothing in the statutory language [of section 10743(a)(1)] suggests that it intends to restrict the term 'consignee' to the ultimate consignee of the freight or use it to mean anything other than the person to whom the bill of lading authorized delivery and who accepts that delivery." *Id.* Second, because "to hold that the documented designation of an entity as a consignee and that entity's acceptance of the freight is insufficient to hold it presumptively liable for demurrage charges would frustrate the plain intent of the statute, which is to establish clear, easily enforceable rules for liability." *Id.* Third, because it would be equitable to treat the named consignee as presumptively liable, as under the statutory scheme "the named consignee can avoid liability in two ways: first, by refusing the freight . . . and second, by providing the carrier timely written notice of agency under Section 10743(a)(1), if appropriate." *Id.* at 259.

The *Novolog* court declined to follow the Seventh Circuit's conclusion in *South Tec* and held that "an entity named on a bill of lading as the sole consignee, without any designations clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers. *Id.* at 262. A party

may rebut that presumption by showing that it never accepted delivery of the shipment, or that it was acting as an agent and followed the notification provisions of 49 U.S.C. § 10743(a)(1). *See id.* at 250, 259. Ultimately, the *Novolog* court remanded the case because "the factual record was not sufficiently developed . . . [t]o determine what the bills of lading showed." *Id.* at 250.

Norfolk relies almost exclusively on the Third Circuit's decision in *Novolog* and argues that as the named consignee on the bills of lading, Savannah was required to either refuse delivery of the shipments or comply with the agency notification requirements of the ICCTA to avoid demurrage liability. However, Norfolk incorrectly assumes that Savannah is the consignee for the shipments at issue simply because it is listed as such on the bills of lading. Norfolk has made no effort to establish Savannah's status as a consignee through either interrogatories or deposition testimony. In fact, Savannah's status as a consignee was neither alleged nor admitted in the pleadings.

Norfolk further argues that section 10743(a)(1) establishes a presumption of liability for demurrage charges. However, section 10743(a)(1) "applies only to agents who are also consignees, and not to agents who are not consignees." *South Tec*, 337 F.3d at 817. Furthermore, that section "speaks only to the 'nonliability' in certain narrow situations . . . but in no way can be read to impose liability on an agent not a party to the contract." *Middle Atl.*, 353 F. Supp. at 1120. If we were to accept Norfolk's assertion that section

10743(a)(1) establishes a presumption of liability, then we would also have to accept that merely naming an entity as consignee on a bill of lading creates a presumption of that status. We are unwilling to accept either proposition and agree with the district court that "the *Novolog* rule of presumptive liability cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties."

Norfolk maintains that Savannah had either actual or constructive knowledge of its designation as consignee on the bills of lading. Yet, Norfolk has failed to present any evidence that Savannah was informed of its consignee designation prior to delivery. Thus, no evidence of actual knowledge exists in the record. Norfolk asks: "if Savannah is neither the consignee nor a disclosed agent of a consignee, how or why is Savannah accepting delivery of the freight?" This question implies that Savannah should have known it was the named consignee because freight shipments may only be delivered to and accepted by the consignee. However, we find this argument inconsistent with the record, which indicates that Norfolk made numerous deliveries to Savannah where it was not the named consignee. Norfolk later amended its complaint to exclude these shipments from its claim for demurrage charges. Savannah cannot be expected to either refuse delivery or notify Norfolk of its agency status when it has no knowledge of which shipments, if any, it has been designated as consignee.

Appendix A

Norfolk emphasizes that it is "well-established and oft-repeated" that a "consignee becomes a party to the contract, and is therefore bound by it, upon accepting the freight . . . ." *Novolog*, 502 F.3d at 254. However, this does not answer the key question: how does an entity become a consignee in the first place?

As previously defined, a consignee is the party designated to receive a shipment of goods. But, consignee status is more than a mere designation. The term takes on a legal significance due to the quasi-contractual relationship that arises between the consignee and the carrier. "Although a consignee's liability may rest upon quasi-contract, a party's status as consignee is a matter of contract and must be established as such." *Consol. Rail Corp. v. Com., Pa. Liquor Control Bd.*, 90 Pa. Commw. 595, 496 A.2d 422, 424 (Pa. Cmwlth. 1985). Like any contractual relationship, there must be a meeting of the minds between the parties. This Circuit has previously recognized that "it is a fundamental principle of contracts that in order for a contract to be binding and enforceable, there must be a meeting of the minds on all essential terms and obligations of the contract." *Browning v. Peyton*, 918 F.2d 1516, 1521 (11th Cir. 1990); *see also, e.g.*, Rest (Second) of Contracts § 17(1) (1981) ("the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"). Furthermore, it is a tenent of contract law that "a third-party cannot be bound by a contract to which it was not a party." *Miles v. Naval Aviation Museum Found., Inc.*, 289 F.3d 715, 720 (11th

Cir. 2002); *see also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002) ("It goes without saying that a contract cannot bind a nonparty."); *Union Pac. R.R. Co. v. Carry Transit, Inc.*, No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568, at *13 (N.D. Tex. Oct. 27, 2005) ("It is a fundamental tenent of contract law that parties to a contract cannot bind a non-party."). Thus, a party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly.

Given these legal principles, we agree with the district court's holding that Savannah was not a consignee, and thus not liable for demurrage charges. Savannah did not agree to be named as consignee on the bills of lading between Norfolk and the various shippers, and was not aware of its designation as such. Savannah cannot be made a party to shipping contracts without its consent or notice of such, and thus cannot be liable to Norfolk for demurrage.

Not only is this approach in keeping with the legal principles outlined above, it also has the greatest support in the case law. *See Matson*, 383 F. Supp. at 157 (reserving the question of whether a consignee who has played an active role in the railroad transportation contract or has an interest in or control over the goods may be liable for the demurrage, but stating: "[W]here, as here, a connecting carrier-consignee is merely named in the railroad bill of lading without either more

involvement on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. To hold otherwise on these facts would be to place a connecting carrier's liability totally within the shipper's control, a result the Court cannot sanction."); *W. Maryland Ry. Co. v. S. African Marine Corp.*, No. 86 CIV 2059, 1987 U.S. Dist. LEXIS 7323, 1987 WL 16153, at *4 (S.D.N.Y. Aug. 13, 1987) ("[W]e decline to hold, as plaintiff urges, that a connecting ocean carrier is liable for rail demurrage charges as a matter of law merely by virtue of being named by the shipper as the consignee in the rail bills of lading."); *Carry Transit, Inc.*, 2005 U.S. Dist. LEXIS 45568, at *14 (shipper's unilateral decision to list defendant as consignee on bills of lading without its consent did not transform defendant into an actual consignee liable for demurrage); *Capital Compress Co.*, 110 S.W. at 1016 (entity not liable for demurrage where mistakenly listed as consignee on bill of lading, because there was no contractual relationship between that entity and the carrier); *CSX Transp. v. Pensacola*, 936 F. Supp. at 884 (stating in dicta that "[t]he unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage" and indicating that an agreement to be contractually bound is key to demurrage liability); *Evans Prods.*, 729 F.2d at 1113 ("No liability [for freight charges] exists merely on account of being named in the bill of lading . . . .").

III.

For the foregoing reasons, the summary judgment of the district court is,

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION DATED AND FILED SEPTEMBER 15, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

CASE NO. CV407-155

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff,

v.

BRAMPTON ENTERPRISES, LLC
d/b/a SAVANNAH RE-LOAD,

Defendant.

ORDER

Before the Court are the Motion for Summary Judgment by Defendant Brampton Enterprises, LLC d/b/a Savannah Re-Load ("Savannah Re-Load")(Doc. 25) and the Motion for Partial Summary Judgment by Plaintiff Norfolk Southern Railway Company (Doc. 29). For the reasons that follow, Savannah Re-Load's Motion for Summary Judgment is **GRANTED**, and Norfolk

Southern's Motion for Partial Summary Judgment is **DENIED.**[1]

BACKGROUND

Defendant Savannah Re-Load is a warehouse business that receives and forwards freight. In late 2006, Savannah Re-Load began handling freight shipped on rail cars owned by Plaintiff Norfolk Southern.

Norfolk Southern transported freight on behalf of various shippers and delivered it to Savannah Re-Load. The majority of the bills of lading for the freight identified Savannah Re-Load as the consignee who was to receive the goods. A "bill of lading" is a "document of title acknowledging the receipt of goods by a carrier or by the shipper's agent" and "a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods." Blacks' Law Dictionary 159 (7th ed. 1999). A "consignee" is "one to whom something is consigned or shipped." *See* Webster's Third New International Dictionary (1971) (unabridged). "Consign" means "[t]o transfer to another's custody or charge" or "[t]o give (goods) to a carrier for delivery to a designated recipient." Black's Law Dictionary 303 (7th ed. 1999).

Under the controlling tariff set by Norfolk Southern, a consignee is allowed two days to unload

---

1. Norfolk Southern's Request for Oral Argument (Doc. 50) is **DENIED.**

freight without incurring demurrage charges. Demurrage is "a charge exacted by a carrier from a shipper or consignee on account of a failure to load or unload cars within the specified time prescribed by the applicable tariffs. Railroads charge shippers and receivers of freight 'demurrage' fees if the shippers or receivers detain freight cars on the rails beyond a designated number of days." *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 251 n.1 (3d Cir. 2007)(quoting *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 559 n.2 (3d Cir. 1997)). "It is intended to both compensate for the delay, and to promote efficiency by deterring undue delays." *CSX Transp., Inc. v. City of Pensacola*, 936 F. Supp. 880, 883 (N.D. Fla. 1995)(internal citation omitted).

Norfolk Southern alleges that Savannah Re-Load is liable for demurrage for the failure to timely unload and return the rail cars. It relies on the bills of lading, which identify Savannah Re-Load as a consignee. After the delays, Norfolk Southern sent invoices to Savannah Re-Load for the demurrage charges.[2] These invoices also identified Savannah Re-Load as the consignee.

Savannah Re-Load maintains that it was not a consignee for the freight and is, therefore, not liable

2. Norfolk Southern computes demurrage monthly. At the end of each month, a customer's total demurrage days are netted against total credits for returning rail cars early. If total demurrage days exceed credits, those days are charged at the daily rate for demurrage as published in Norfolk Southern's tariff. (*See* Doc. 26 Ex. C.)

for demurrage. According to Savannah Re-Load, freight-forwarding companies make their transport arrangements—to send freight via Norfolk Southern or other carriers—without Savannah Re-Load's input. (*See* Groves Aff., Doc. 26 Ex. A.) The freight-forwarding companies unilaterally give Savannah Re-Load notice that a given shipment is enroute to its facility. After the freight arrives at the facility, Savannah Re-Load unloads the freight and forwards it to various ports for export according to instructions from the freight-forwarding company. Savannah Re-Load never takes any ownership interest in the freight it handles and is never the freight's final destination. Savannah Re-Load is never a party to the transportation contract, and only operates as instructed by the freight-forwarding companies. (*Id.*)

Savannah Re-Load also contends that it is neither provided with copies of the bills of lading nor informed of the contents of the bills of lading. (*Id.* at 1.) With respect to the freight at issue in this case, Savannah Re-Load did not draft, approve of, or receive any bills of lading associated with the rail freight at any time. Similarly, it did not receive copies of the purchase or transportation contracts. In general, Savannah Re-Load does not inspect or evaluate freight to see if it arrives in conformity with the purchase or transportation contract. Savannah Re-Load admits that it was identified as a consignee in the bills of lading, but claims that this was a unilateral act of the shipper, about which it had no knowledge. (*Id.*)

Appendix B

ANALYSIS

It is well-established that one must be a consignee or a party to the transportation contract in order to be liable for demurrage. *Middle Atl. Conference v. United States*, 353 F. Supp, 1109, 1118 (D.D.C. 1972). The parties agree that the issue before the Court in this case is whether Defendant Savannah Re-Load was a consignee of the freight delivered by Plaintiff Norfolk Southern. Norfolk Southern contends that Savannah Re-Load was a consignee because it was identified as a consignee on the bills of lading and because it accepted delivery of the rail cars and the freight. Savannah Re-Load argues that it cannot be made consignee merely because a third party unilaterally listed it as such without its knowledge or consent.

I. Savannah Re-Load did not receive notice that it was listed as a consignee.

Savannah Re-Load claims that it did not receive notice that it was listed as a consignee in the bills of lading. The operator of Savannah Re-Load, Billy Groves, states that Savannah Re-Load did not receive any bills of lading and was never informed that the bills of lading identified it as a consignee. (Groves Aff. at 1-2.)

Norfolk Southern acknowledges that it did not provide Savannah Re-Load with bills of lading because this is not standard practice in the industry. Norfolk Southern surmises that Savannah Re-Load received notice of its consignee designation in the forwarding

instructions from the freight-forwarding companies, but there is no evidence of this. Norfolk Southern informed Savannah Re-Load of the consignee designation in invoices it sent to Savannah Re-Load for demurrage *after* the delays occurred, and therefore after the demurrage claim arose. There is no other evidence that Savannah Re-Load received any notice that it was designated as a consignee on the bills of lading.

In the absence of a genuine issue of material fact, the Court finds that Savannah Re-Load had no knowledge that it was listed as a consignee until after the delays occurred.

II. Savannah Re-Load was not a consignee.

The Court holds that Savannah Re-Load cannot be made a consignee by the unilateral action of a third party, particularly where Savannah Re-Load was not given notice of the unilateral designation in the bills of lading. There are no binding decisions on this issue in the Eleventh Circuit, and other courts have issued conflicting decisions. But, as explained below, the weight of authority supports this holding and provides the more reasonable result under the specific facts of this case.

The Interstate Commerce Commission Termination Act (TCCTA) governs the demurrage liability of consignee-agents when the transportation is provided by a rail carrier. The consignee-agent liability provision provides, in pertinent part:

> When the shipper or consignor instructs the rail carrier transporting the property to deliver it to *a consignee that is an agent only*, not having beneficial title to the property, *the consignee* is liable for rates [for transportation] billed at the time of delivery for which *the consignee* is otherwise liable, but not for additional rates [including demurrage] that may be found to be due after delivery if *the consignee* gives written notice to the delivering carrier before delivery of the property (A) of the agency and absence of beneficial title; and (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743 (a) (1).

In a case involving similar facts, the Seventh Circuit held that this statute "applies only to agents who are also consignees, and not to agents who are not consignees." *Ill, Cent. R.R. Co. v. S. Tec Develop. Warehouse, Inc.*, 337 F.3d 813, 817 (7th Cir. 2003), After concluding that the statute only applies to consignees, the court reasoned that the preliminary issue was whether the defendant warehouseman was a consignee. Although the case was remanded to the district court for a final determination of the warehouseman's status, the Seventh Circuit stated that "being listed by third parties as a consignee on some bills of lading is not alone

enough to make a [warehouseman] a legal consignee liable for demurrage charges." *Id.* at 821.

The *South Tec* opinion is consistent with several other decisions. In *Southern Pacific Transportation Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974), the court held that the defendant terminal operator was not liable for demurrage. The defendant was not named as consignee on the bills of lading for *most* of the shipments, but was named as consignee for *some* of the shipments. First, the court held that the defendant could not be liable for demurrage where the bills of lading named it as a "care of" party and not as consignee. The court then stated:

> Turning now to those instances where [the terminal operator] was named consignee on the railroad bill of lading, the Court observes that the holding set forth above does not necessitate a holding here that anyone named as consignee in a contract of transportation can be held liable for demurrage.
>
> There is no evidence that [the terminal operator] authorized shippers to consign goods to it or that it performed its task differently in those instances. In fact the sole difference between the two situations was the shipper's unilateral decision whom to name as consignee. The instant case differs in this respect from the others cited by the parties,

> where the consignee was either the purchaser of the cargo or, at least, the person to whom final delivery was to be made and who thus had an interest in and control over the cargo.

Id. at 157. Based on this reasoning, the court held that the defendant was not liable for demurrage where it was unilaterally named by the shipper as consignee in the bills of lading. To hold otherwise, stated the court, "would be to place a connecting carrier's liability totally within the shipper's control, a result the [c]ourt cannot sanction." *Id.*; see *also Union Pac. R.R. Co. v. Carry Transit, Inc.*, No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568 (N.D. Tex. 2005)(declining to "untether the law of demurrage from its contractual moorings" and holding that "a [shipper's] unilateral decision to name a non-party to the transportation contract . . . as a consignee without its consent does not render the non-party a consignee liable for demurrage charges"); *W. Md. Ry. Co. v. S. African Marine Corp.*, 1987 U.S. Dist. LEXIS 7323, 1987 WL 16153, *4 (S.D.N.Y. 1987)(holding that a connecting ocean carrier is not liable fox rail demurrage charges "merely by virtue of being named by the shipper as the consignee in the rail bills of lading"); *see generally CSX Transp., Inc. v. City of Pensacola*, 936 F. Supp. 880, 884 (N.D. Fla. 1995)(finding defendant not liable for demurrage where it had not been named as consignee in the bills of lading, but stating in dicta that the "unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage").

In opposition to this line of authorities, Norfolk Southern relies on a recent decision by the Third Circuit in *CSX Transportation Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007). The Third Circuit "decline[d] to follow" the authorities cited above, specifically the Seventh Circuit's decision in *South Tec. Id.* at 259. Instead, the Third Circuit held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another and comply with the notification procedures established in ICCTA's consignee-agent liability provision, 49 U.S.C. § 10743(a)(1)." *Id.* at 254. According to the Third Circuit, the statutory provision applies to an entity listed as consignee on the bill of lading, even if the entity was unilaterally named as consignee by the shipper, is not a party to the transportation contract, and has no ownership interest in the freight. *Id.* at 252. Under the Third Circuit's reading of the statute, "a transloader or other such entity, if named on the bill of lading as the sole consignee, is *presumptively liable* for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status [as an agent] in writing prior to the delivery." *Id.* at 250 (emphasis added). The court reasoned that consignee status was established by "the documented designation of an entity as a consignee and that entity's acceptance of the freight." *Id.* at 257.

In this case, Norfolk Southern argues, based on the *Novolog* decision, that Savannah Re-Load is liable for demurrage because (1) Savannah Re-Load is identified

as a consignee on the bills of lading; (2) Savannah Re-Load accepted delivery of the rail cars and the freight; and (3) Savannah Re-Load did not notify Norfolk Southern of its agent status and the name and address of the beneficial owner. Effectively, Norfolk Southern contends that Savannah Re-Load accepted it status as consignee by accepting the freight, and it suggests that Savannah Re-Load could have rejected these terms by rejecting the freight or giving notice of its agent status.

The Court disagrees. Consistent with Seventh Circuit's decision in *South Tec*, the Court holds that ICCTA's consignee-agent liability provision applies only to consignees. *South Tec*, 337 F.3d at 817. Therefore, an entity that is not a consignee is not obligated to comply with the statutory notice provisions in order to avoid liability for demurrage, and such an entity does not become a consignee by operation of the statute.

The Court also holds that a theory of acceptance by conduct is inapplicable to a situation where Savannah Re-Load was unaware of terms set unilaterally by third parties. As discussed above, there is no evidence that Savannah Re-Load was provided with the bills of lading or informed of the terms of the bills of lading. The Court finds that the *Novolog* rule of presumptive liability cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties.

Appendix B

In *South Tec*, the Seventh Circuit suggested that being listed on the bills of lading, "coupled with other factors," might be enough to render a warehouseman a consignee. *South Tec*, 337 F.3d at 821. Such "other factors" could include receiving notice of a consignee designation, playing an active role in the railroad transportation contract, or having an interest in or control over the goods. *See id.* at 821-22; *W. Md. Ry. Co.*, 1987 U.S. Dist. LEXIS 7323, 1987 WL 16153 at *4; *Matson*, 383 F. Supp. at 157. But factors such as these are not at play in this case.[3]

Next, Norfolk Southern argues that "regardless of whether Savannah Re-Load was provided with the necessary documentation, the fact remains that the rail cars were delivered to Savannah [Re-Load] by Norfolk Southern, and that while those rail cars were in the control, custody, and possession of Savannah [Re-Load], the federal law requiring demurrage was frustrated by Savannah [Re-Load]'s detention of rail cars in excess of the allotted amount of time." (Plf.'s Reply at 7.) Although such a rule would be appealing in its simplicity, it is

---

3. Norfolk Southern states that after it demanded payment for the demurrage charges, representatives from Savannah Re-Load disputed the manner in which the demurrage charges were calculated, but never disputed that it was the consignee that had responsibility to pay the demurrage charges. With this statement, Norfolk Southern suggests that Savannah Re-Load admitted its liability in negotiations prior to the filing of this lawsuit. This is insufficient to create a legal liability. Savannah Re-Load did not pay any of the demurrage invoices, and Norfolk Southern brought this lawsuit as a result.

inconsistent with the well-established law that one must be a consignee or a party to the transportation contract in order to be liable for demurrage. *Middle Atl. Conference*, 353 F. Supp. at 1118. And as explained above, Savannah Re-Load cannot be made a consignee by the unilateral action of a third party where Savannah Re-Load was not given notice that it was listed as a consignee in the bills of lading.

CONCLUSION

Accordingly, Savannah Re-Load's Motion for Summary Judgment is **GRANTED**. Norfolk Southern's Motion for Partial Summary Judgment is **DENIED**. The Clerk of Court is **DIRECTED** to **CLOSE** this case.

SO ORDERED this 15th day of September, 2008.

/s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 7, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-15418-JJ

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff-Appellant,

versus

BILLY GROVES, individually, d.b.a. Savannah Re-Load, SAVANNAH RE-LOAD, et al.,

Defendants,

BRAMPTON ENTERPRISES, LLC, d.b.a. Savannah Re-Load,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Appendix C

Before: CARNES, FAY and ALARCÓN,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

---

* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.